

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN
SHERIDAN, JOHN EARL
HAGGARD, CHARLES JAMES
RITCHARD, JAMES DAVID
HOOPER, and DARREN WADE
RUBINGH,

Plaintiffs,

v

GRETCHEN WHITMER, in her
official capacity as Governor of the
State of Michigan, JOCELYN
BENSON, in her official capacity as
Michigan Secretary of State and the
Michigan BOARD OF STATE
CANVASSERS,

Defendants,

CITY OF DETROIT,
Intervening Defendant,

ROBERT DAVIS,
Intervening Defendant,

DEMOCRATIC NATIONAL
COMMITTEE and MICHIGAN
DEMOCRATIC PARTY,

Intervening Defendants.

No. 2-20-cv-13134

HON. LINDA V. PARKER

MAG. R. STEVEN WHALEN

**DEFENDANTS WHITMER
AND BENSON'S MOTION
FOR LEAVE TO FILE
SUPPLEMENTAL
BRIEFING**

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**DEFENDANTS WHITMER AND BENSON'S MOTION FOR
LEAVE TO FILE SUPPLEMENTAL BRIEFING**

Defendants Governor Gretchen Whitmer and Secretary of State
Jocelyn Benson¹ move for leave to file a supplemental brief, attached as

¹ Defendant Board of State Canvassers does not join in this motion.

Exhibit 1, in support of their *Motion for Sanctions Under 28 U.S.C. § 1927* for the following reasons stated in the attached brief.

Respectfully submitted,

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Dated: April 6, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2021, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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Statutes

28 U.S.C. § 1927 1

CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Defendants Governor Gretchen Whitmer and Secretary of State Benson should be permitted to file a supplemental brief in support of their motion for sanctions.

ARGUMENT

On January 28, 2021, Defendants Whitmer and Benson filed a motion seeking sanctions against Plaintiffs' counsel pursuant to 28 U.S.C. § 1927 and the Court's inherent authority. (ECF No. 105.) Plaintiffs filed a response to that motion on February 11, 2021 (ECF No. 112), and Defendants Whitmer and Benson filed a reply in support of their motion on March 11, 2021. (ECF No. 116.)

On March 22, 2021—almost two weeks after briefing on Defendants' sanctions motion had closed—Ms. Powell filed a motion to dismiss the Dominion Action. In her brief in support of that motion, Ms. Powell made a series of stunning admissions. Addressing the statements raised in the Dominion Action, many of which also were made to this Court, Ms. Powell conceded that “no reasonable person would conclude that the statements were truly statements of fact,” but rather were “claims that await testing by the courts through the adversary process.” Ms. Powell further argued that it was this Court's responsibility—not hers or her co-counsels'—to investigate the veracity of the statements on which this action was based.

These admissions go to the heart of the State Defendants' argument in their pending motion: the admitted conduct of Plaintiffs' counsel warrants sanctions because it unreasonably multiplied the proceedings in this case and abused the judicial process. *See Salkikl v. Mt. Sterling Twp. Police Dep't*, 458 F.3d 520, 532 (6th Cir. 2006).

Defendants Whitmer and Benson therefore seek to put these new admissions before the Court through the supplemental brief attached as Exhibit 1.

Courts in the Sixth Circuit permit the filing of supplemental briefs where there is good cause to do so. *See NCMIC Ins. Co. v. Smith*, 375 F. Supp. 3d 831, 836 (S.D. Ohio 2019). "While the Court is not required to accept every filing submitted by a party, leave to file supplemental briefs may be granted in the interests of justice when the proposed submission contains 'new authority or evidence that was not available [to the movant] in the exercise of reasonable diligence' when the original briefs were filed." *Valassis Comms. v. News Corp.*, No. 13-14654, 2015 U.S. Dist. LEXIS 188366, at *3 (E.D. Mich. Dec. 23, 2015) (citation omitted).

Even absent good cause, courts may grant supplemental briefing where the non-moving party will suffer no prejudice by the filing of the brief. *NCMIC Ins.*, 375 F. Supp. 3d at 836.

Here, there is good cause to permit Defendant Whitmer and Benson's supplemental brief. Ms. Powell's admissions in the Dominion Action are directly relevant to Defendants' sanctions motion here. And Because Ms. Powell did not make the admissions until March 22, 2021, no amount of diligence on Defendants' part would have made the statements available before briefing on the sanctions motion closed on March 11, 2021.

Further, there will be no harm to Plaintiffs or their counsel if the Court grants leave here. The statements that Defendants seek to put before the Court came from Ms. Powell herself. Thus, there can be no unfair surprise or other prejudice to Plaintiffs or their counsel because the proposed brief merely addresses Ms. Powell's own statements.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Governor Gretchen Whitmer and Secretary of State Jocelyn Benson respectfully request that this

Honorable Court enter an Order granting Defendants leave to file the supplemental brief attached as Exhibit 1.

Respectfully submitted,

Dana Nessel
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